No. 13011

In the United States Court of Appeals for the Ninth Circuit

BERNICE FEITLER AND IRWIN FEITLER, INDIVIDUALLY AND TRADING AS GARDNER & COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR RESPONDENT

W. T. KELLEY,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
JNO. W. CARTER, JR.,
Attorney,
Attorneys for Federal Trade Commission.

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BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint charging petitioners with engaging in unfair acts and practices in commerce in violation of the Federal Trade Commission Act.[1]

[1] The pertinent provisions of the statute are as follows:

"SEC. 5 (a). * * * Unfair or deceptive acts or practices, in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships or corporations * * * from using * * * unfair or deceptive acts or practices in commerce." 52 Stat. 111–112; 15 U. S. C. 45 (a).

The complaint (Tr. R. pp. 3–9) alleged (Tr. R. pp. 3–4) that Bernice Feitler and Irwin Feitler,[2] individuals trading as Gardner & Company, with their principal office located at 2309 Archer Avenue, Chicago, Illinois, and branch offices in Philadelphia, Pennsylvania, New Orleans, Louisiana, and San Francisco, California, were engaged in the manufacture, and in the sale and distribution in interstate commerce to manufacturers of, and dealers in, merchandise in commerce, of various types of push cards and punch boards, all designed, prepared, and arranged so that when used in selling merchandise, a game of chance, gift enterprise, or lottery scheme is involved.

The complaint further alleged (Tr. R. pp. 6–7) that many persons, firms, and corporations who distribute and sell merchandise in interstate commerce and in the District of Columbia, purchase petitioners' push cards and punch boards and pack and assemble assortments of merchandise with said boards; that retail dealers who purchase such assortments from manufacturers or wholesale jobbers, and retail dealers who purchase petitioners' devices direct from petitioners and make up their own assortments, expose such assortments to the purchasing public and have sold such merchandise by means of petitioners' push cards and punch boards; that because of the element of chance involved, members of the purchasing public have been induced to buy from such retail dealers, and

[2] Several other individuals were named as respondents. The Commission, however, found that prior to the issuance of the complaint these respondents had sold their interest in the business to petitioners. The Commission therefore dismissed the complaint as to these.

as a result many retail dealers have been induced to deal with manufacturers, wholesale dealers, and jobbers who distribute pettiioners' push cards and punch boards with their merchandise.

The complaint further alleged (Tr. R. p. 8) that the sale of merchandise to the public by the use of push cards and punch boards involves a game of chance or the sale of a chance to procure merchandise at less than normal retail prices; teaches and encourages gambling among members of the public, all to the injury of the public; and is a practice which is contrary to an established public policy of the Government of the United States and constitutes an unfair method of competition and an unfair act and practice in commerce.

The complaint further alleged (Tr. R. p. 8) that by the sale of their push cards and punch boards, petitioners supply to, and place in the hands of, others the means of conducting lotteries, games of chance, or gift enterprises in the sale or distribution of merchandise; thus providing others with the means of, and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce in the sale of merchandise.

On the basis of the above allegations, the complaint charged (Tr. R. p. 9) that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act.

By their answer (Tr. R. pp. 12–14), petitioners admitted that they were partners trading and doing

business as Gardner & Company, but other than this, denied all allegations of the complaint.

After the taking of evidence on behalf of the Commission and petitioners, the Commission on the 3rd day of May 1951 made its findings as to the facts (Tr. R. pp. 26–32) which accord with the allegations of the complaint as above outlined, concluded (Tr. R. p. 32) that petitioners' acts and practices are "all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act," and entered its order (Tr. R. pp. 24–26) directing petitioners to cease and desist from:

> Selling or distributing in commerce as "commerce" is defined in the Federal Trade Commission Act push cards, punch boards or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

Thereafter, on the 5th day of July 1951, petitioners filed their motion (Tr. R. pp. 33–62) to set aside the cease and desist order and reopen the proceedings for the purpose of receiving additional evidence. On the 9th day of August 1951, the Commission entered an order denying this motion (Tr. R. pp. 62–63).

Petitioners thereafter filed their petition to review and set aside the Commission's order (Tr. R. pp. 89–92) and their Statement of Points upon which they intended to rely (Tr. R. p. 93). On the 3rd day of December 1951, petitioners filed a Supplemental State-

ment of Points (Tr. R. p. 94) and a Supplemental Designation of the Record (Tr. R. p. 95).[3]

Most of the points which petitioners in their Statements of Points said they relied on are not developed or argued in their brief. The points not argued are therefore abandoned.[4]

II

QUESTIONS PRESENTED

Fourteen of the twenty pages of petitioners' brief devoted to argument develop or are addressed to issues not raised on their petition to review. In their brief (p. 5) under the heading "Assignment of errors," petitioners set out five errors alleged to have been committed by the Commission. The first alleged error is as follows:

> The hearing granted petitioners herein did not comply with the due process clause of the Constitution nor with the Administrative Practices Act.[5]

Petitioners argue this alleged error on pages 6–13 of their brief. This Assignment of Error is not covered by petitioners' Statements of Points and invokes into this review wholly new matter, requiring entirely different factual consideration and involving com-

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[3] By stipulation, approved by the Court, the Commission on the 6th day of January 1952 filed a designation (Tr. R. p. 139) of additional portions of the record to be printed. (See Supp. Tr. R. pp. 107–138.)

[4] *Donnelley* v. *United States*, 276 U. S. 505, 511 (1928); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 369 (1927).

[5] Undoubtedly petitioners are here referring to the Administrative Procedure Act.

pletely different principles of law from any of the points upon which petitioners stated they intended to rely.

In addition to the above Assignment of Error, petitioners argue additional new matters. On pages 13–16 of their brief, petitioners argue the negative of the question "Is the interstate shipment of punchboards a practice deemed undesirable by Congress?" and on pages 16–19, the negative of the question "Has the use of punchboards to distribute merchandise spread into line after line of merchandise?". These questions are not only not within the field of petitioners' Statement of Points, but they are not even within the scope of petitioners' Assignment of Errors in their brief. Due to petitioners' failure to include these matters in their Statements of Points, the printed transcript of record as it now stands before the Court is devoid of very material portions of the certified record which would clearly establish that petitioners' argument in this respect is without merit.[6]

We have no quarrel with petitioners that they are entitled to a fair and impartial hearing under the due process clause of the Constitution; and that the hearings below must conform to the applicable provisions of the Administrative Procedure Act. We do contend, however, that this question is not properly before the Court on review. Lack of due process in the hearings below is not among the points upon which petitioners

[6] Subparagraph 6 of Rule 19 of the Rules of this Court precludes petitioners from presenting and arguing these new matters in their brief. This Rule also declares that if any material portion of the certified record is not printed the Court, in its discretion, may dismiss the petition to review.

stated they intended to rely. Even if it had been, petitioners failed to comply with the applicable provisions of subparagraph 6 of Rule 19 of this Court's Rules, which requires petitioners to print *all* of the certified record material to the question under consideration. Those portions of the certified record will disclose that petitioners were fully apprised of all evidence relied upon and to be considered by the Commission, were accorded the full right to cross-examine all witnesses and to inspect all documents and exhibits, the right to a full opportunity to introduce evidence in rebuttal and the right to be heard. All of these elements of fair hearing constituting due process of law were accorded petitioners.

No one has a vested right to any given mode of procedure. *Gwin* v. *United States,* 184 U. S. 669, 674 (1902). And it is academic, requiring neither the citation of authority nor argument, that neither does any one have any right to introduce into the record incompetent, immaterial and irrelevant evidence. The issue raised below by the pleading was:

> Is the sale and distribution in interstate commerce of punchboards and push cards designed and used for the sale and distribution of merchandise by a game of chance, gift enterprise, or lottery scheme an unfair act or practice within the intent and meaning of the Federal Trade Commission Act?

That was the sole and only issue. Petitioners attempted to introduce evidence in reference to:

> (1) The type of people who patronize punchboards;

(2) The type of place where punchboards are displayed and operated;

(3) The reasons people have for punching punchboards;

(4) The type of merchandise distributed by punchboards;

(5) The effect of the use of punchboards on competition in the distribution of merchandise;

(6) That punchboards are not sales aids or stimulators of trade; and

(7) That punchboards are not popular.

Such testimony has nothing whatever to do with the above issue. It is wholly immaterial, irrelevant, and incompetent. The Trial Examiner struck this type of evidence from the hearings in Salt Lake City, Utah, held on May 17, to 22, 1945. On appeal to the Commission from the ruling of the Trial Examiner the Commission sustained the Trial Examiner.

Petitioners' contentions here are not based upon the order of the Commission sustaining the Trial Examiner's ruling in 1945 striking certain testimony but are based upon the order of the Commission denying the motion to set aside the Commission's order filed by petitioners in 1951. We submit, therefore, that the question of due process of law is not properly before this Court, but even if the Court should consider that it is, petitioners' violation of this Court's rule subjects their petition to review to an order of dismissal.

Since under Rule 19 of the Rules of Practice of this Court petitioners are estopped from now raising the issues argued in their brief at pages 6–19, and since petitioners do not in their brief question the Commission's findings of fact but confine their argu-

ment to the propositions that: (1) the interstate shipment of punchboards to be used to distribute merchandise is not within the purview of the Federal Trade Commission (Br. pp. 22–23); (2) the order issued herein is too broad (Br. pp. 23–24); and (3) this proceeding is not in the interest of the public (Br. pp. 24–25), we believe that for simplicity and clarity the questions actually presented can be stated as follows:

> (1) Does the Federal Trade Commission have jurisdiction to prohibit the sale and distribution in interstate commerce of lottery devices designed and arranged for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise, or lottery?
>
> (2) Is the order to cease and desist too broad? and
>
> (3) Is the proceeding in the public interest?

III

ARGUMENT

Preliminary statement

We sincerely regret that the time of a busy Court should be taken up with a petition to review that has so little to commend it. In view of the recent decisions of this Court in *Lichtenstein et al.* v. *Federal Trade Commission,* 194 F. 2d 607 (C. A. 9, 1952) and *Bork Manufacturing Co., Inc., et al.* v. *Federal Trade Commission,* 194 F. 2d 611 (C. A. 9, 1952), the petition to review in the instant matter (insofar as it questions the authority of the Commission to prohibit the sale and distribution in interstate commerce of lottery

devices used to sell merchandise by means of a game of chance, gift enterprise, or lottery scheme) is frivolous, wholly without merit, and completely devoid of substance.

The controversy in the instant case, as it was in those two cases, is concerned with the sale and distribution of lottery devices. Petitioners' brief here, as the briefs in those two cases, admits the sale and distribution in interstate commerce of such lottery devices and their use to distribute merchandise. The order in the instant matter is identical with the order issued in the *Bork* case and with the second part of the order issued in the *Lichtenstein* case.[7]

If ever there was a brief which on its face shows a desperate effort to find legal support for its contention, it is petitioners' brief here. The attorney for petitioners here also represented petitioners in the *Lichtenstein* and *Bork* cases before this Court. His brief in the instant matter is a miniature replica of his briefs in those cases. Finding no support among the authorities for his contention here, the attorney, just as in those briefs, contends that the decree of the Supreme Court in *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349 (1941) is controlling. In his brief here (pp. 20–23), just as in the *Lichtenstein* and *Bork* briefs, he questions the application of the principle of law laid down in *Federal Trade Commission* v. *Keppel & Bros., Inc.,* 291 U. S. 304 (1934), and takes issue with the decision of the Seventh Circuit in *Chas. A. Brewer & Sons* v. *Federal Trade Com-*

[7] The Court modified the order in each of these cases by striking the words "or may be used."

mission, 158 F. 2d 74, and in addition thereto, in the instant brief, questions the correctness of the decision of this Court in the *Lichtenstein* and *Bork* cases, the decision of the Third Circuit in *Globe Cardboard Novelty Co., et al.* v. *Federal Trade Commission,* 192 F. 2d 444 (C. A. 3, 1952), and the decision of the Court of Appeals for the District of Columbia in *Hamilton Manufacturing Company* v. *Federal Trade Commission,* 194 F. 2d 346 (C. A. D. C. 1952), contending here as he did in the prior cases that the Federal Trade Commission Act is subject to the rule of strict construction, and therefore the word "using" appearing in the Federal Trade Commission Act cannot be construed to mean aiding, abetting, inducing, and procuring.

We cannot help but feel about the instant matter as the Third Circuit did about *Minter Bros.* v. *Federal Trade Commission,* 102 F. 2d 69 (C. A. 3, 1939)—a lottery case—where the Court, speaking through Circuit Judge Clark, at page 69, began its opinion with these words: "This seems to us a futile continuation of earlier litigation." How exceedingly appropriate and applicable that observation is when, some 13 years after it was made, it is applied to this case. Petitioners' counsel here, as he did in the *Lichtenstein* and *Bork* cases, relies on the same old discredited contentions that this Court and other Courts of Appeals have rejected. We could not help but wonder how many times this particular Court of Appeals, and how many other Courts of Appeals, must decide that it is in the public interest, and the Commission has authority, to prevent the interstate shipment of lottery

devices designed and used for the sale of merchandise by lottery, before it will finally dawn upon counsel that Courts of Appeals mean what they say and their decisions should not be ignored or lightly brushed aside and their time taken up by a rehashing of discredited and rejected theories.

1. The Federal Trade Commission has jurisdiction to prohibit the sale and distribution in interstate commerce of punchboards and push cards designed and sold for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise, or lottery

The applicable law is well settled. The Federal Trade Commission has jurisdiction over practices in interstate commerce which are contrary to the public policy of the United States Government. *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 411, 453 (1922).

The sale of merchandise by means of a game of chance, gift enterprise, or lottery scheme is contrary to the public policy of the United States Government. *Federal Trade Commission* v. *R. F. Keppel & Bros., Inc.,* 291 U. S. 304, 313 (1934).

It is likewise well settled that to supply another with a means of violating the Federal Trade Commission Act is also a violation of the Act. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 494 (1922). This principle has repeatedly been applied to cases in which the medium supplied was a lottery device. *Lichtenstein, et al.* v. *Federal Trade Commission,* 194 F. 2d 607 (C. A. 9, 1952); *Bork Manufacturing Co., Inc., et al.* v. *Federal Trade Commission,* 194 F. 2d 611 (C. A. 9, 1952); *Hamilton Manufacturing Company* v. *Federal Trade Commis-*

sion, 194 F. 2d 346 (C. A. D. C., 1952); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444 (C. A. 3, 1951); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C. A. 7, 1944).

Petitioners' contention here (Br. pp. 22–23) is that the Federal Trade Commission Act limits the Commission's power to the use of unfair methods of competition and unfair or deceptive acts or practices in commerce. This is one statement in petitioners' brief in which we concur. However, petitioners then go on to argue that the decision of the Courts in the *Brewer, Globe,* and *Hamilton* cases and this Court's decision in the *Lichtenstein* and *Bork* cases were based upon the theory that the Commission has the power to "stop anyone who aids, abets, induces or procures others to violate the Act"; that such a theory is not permissible under the rule of strict construction which must be applied to the Federal Trade Commission Act. There is no merit whatever to this, and petitioners cite no authority in support thereof because there is none.

A complete reply to petitioners' argument here, if any is necessary, is that this same argument was made in the *Lichtenstein* and *Bork* cases and rejected by this Court.[8] Speaking through Chief Judge Denman, the Court said:

> Upon a review of the history of Section 5 (a) in connection with the decisions of the Court thereon, we are of the opinion that the petitioner's use of interstate commerce to ship these

[8] See also cases cited, supra, pp. 12–13.

devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the "unfair * * * practices in commerce" subject to the preventive control of the Commission.

We therefore submit that the Commission does have jurisdiction over the interstate shipment of lottery devices, such as are here involved and in the proper case to issue its order prohibiting such shipment.

2. The Commission's order to cease and desist is not too broad

Relying on the decision of the Supreme Court in *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U. S. 349 (1941), petitioners next contend (Br. p. 23) that the order to cease and desist is too broad and should be modified so as to prohibit the shipment of lottery devices to those "who use them in a manner which violates the Federal Trade Commission Act" and should not prohibit shipment to those who use them in the intrastate sale of merchandise. There is no merit to this and the *Bunte* case is not applicable. The *Bunte* case involves transactions that were wholly in intrastate commerce. The instant matter is concerned with transactions wholly in interstate commerce. The complaint neither charged, nor does the order prohibit, intrastate shipment of lottery devices. The order merely prohibits their shipment in interstate commerce. This same contention was made before this Court in the *Lichtenstein* and *Bork* cases and the Court rejected it by affirming the Commission's order.

The petitioners next state (Br., p. 24) that the words "or may be used" should be deleted from the

order to cease and desist. This same contention was made in the *Lichtenstein* and *Bork* cases. The Court agreed, and, speaking through Chief Judge Denman, in the *Lichtenstein* case, said:

> Petitioner further contends that if we hold the Commission's second order to be valid, the phrase, "or may be used," should be stricken from it. We agree.

The Court then went on to say that the issue was confined to lottery devices "the 'only' use to be made of which was to enable the ultimate purchasers to sell or distribute other merchandise," citing in two footnotes the allegation in the complaint and the findings of the Commission in reference thereto.

The complaint in the instant matter contains a similar allegation and the Commission's findings of fact contain a similar finding. However, the instant case, we believe, can be distinguished factually from the *Lichtenstein* and *Bork* cases to an extent that the Court would be justified in affirming the instant order without the deletion requested.

We respectfully call the Court's attention to the testimony of F. W. James, a specialist in the punch board business, now appearing as counsel for petitioners in the instant matter (see Tr. R., pp. 66–68, and Supp. Tr., pp. 130–138). Mr. James testified in substance that some of the boards distributed by petitioners in interstate commerce are known as "Examination Game" and "Checker" boards; that a book of answers is distributed with the "Examination Game" board and a sticker, that can be pasted on the back of the board, is also distributed with petitioners'

board—the sticker has printed thereon a checkerboard with numbers appearing on the black spaces, ten checker problems, and other printed instructions.

Mr. James further testified that when the punch board is used as an "Examination Game," the person punches the board and on the back of the ticket punched appears a question with a number and the number thereon refers to the answer in the book of answers; that when used as a checkerboard, the number appearing on the ticket punched refers to a problem of checkers appearing on the back of the board; that if a correct answer is given to the question or a correct solution made of the checker problem, a prize is awarded.

Mr. James further testified that a salesman reprerenting Chas. Brewer & Sons had a patent on this type of boards and that during the life of these patents he, Mr. James, was not able to use the boards very extensively because every time he attempted to do so he was threatened with a suit. He stated that since the patent had expired and since Chas. Brewer & Sons had gone out of business,[9] "I have worked on a big, what I would call a big, or broad campaign that industry is going to establish as soon as conditions get back somewhere near normal whereby there will be all through the United States the using of the boards according to the running of the contests and examinations" (Tr. R., pp. 130–131). He further stated

[9] The Commission issued a cease and desist order against Chas. A. Brewer & Sons prohibiting them from the interstate shipment of lottery devices. When the order of the Commission was affirmed (see 158 F. 2d 74), this concern went out of business.

"Well, we have as I said a program all ready now to start, now that the patent has expired throughout the U. S., which will be used by all the companies where heretofore it was confined to Charles A. Brewer and Sons, that is, practically. You see, Brewer uses the checker idea all over the U. S., as I understand it, * * *" (Supp. Tr. R., p. 132).

When Mr. James was asked if he knew how many of the "Examination Game" and "Checker" boards were distributed by petitioners, he replied that he did not know. He was also asked if he knew how many of the checker stickers were affixed to petitioners' boards and he stated, "I don't think they have ever affixed any. I don't know of the company itself ever affixing any of those checker problems to the boards" (Supp. Tr. R. p. 133).

Mr. James further stated that he did not know the approximate number of checker stickers distributed with petitioners' boards. He also said that he did not know how many of the answer books were distributed by petitioners with their boards and that he did not know how many of these books were actually used by petitioners' customers.

He stated that he thought all of petitioners' boards except the money boards contained the question feature on the punch tabs (Tr. R. p. 77). Mr. James, counsel for petitioners, tells the Court in his brief (p. 24): "All of petitioners' boards are numerically keyed to an answer book. Every ticket in every board has printed upon it a question and a book containing the correct answer to each question is furnished. * * *"

That "Coming events cast their shadows before them" is illustrated by the testimony of Mr. James. He has warned the Commission and advised this Court that the punchboard industry intends to flood this country with a so-called new type of punchboard—such as is used by the petitioners in the instant case—assertedly designed to be used for educational purposes. By his testimony, he would have the Court to believe that the punchboard industry has reformed and is no longer interested in the manufacture and sale of punchboards designed and used to distribute merchandise by a game of chance, gift enterprise, or lottery scheme. That, on the contrary, it is now interested in a broad program of education, a program that will encourage the individual to become a seeker after knowledge, so that he will be able to answer such questions as: "What is the Japanese population of the United States?" (Tr. R. p. 68); or, if he so desires, become an expert in solving various checker problems. These so-called educational and checker punchboards are but another in the long line of subterfuges used in attempting to evade prohibitions against lotteries in the distribution of merchandise. The original punchboard was designed, manufactured, and sold solely for the purpose of selling and distributing merchandise by lottery. It was known as a merchandise board—later on the same board or type of board was used for gambling—instead of obtaining merchandise for a prize, the puncher, if lucky, obtained a certain sum of money. The punchboard today is of exactly the same basic design. It has not changed, except to-

day it is better constructed and perhaps has more "eye appeal." All of the punchboards from the first ones to those in use today are constructed with varying numbers of holes in which are concealed slips of paper having thereon numbers and, the most recent ones also having thereon other printed matter. You may call these boards what you will, they are all of the same basic design, and that design came into existence for the sole purpose of supplying a means which would enable one to distribute merchandise by lottery. Regardless of what they are called they are basically and inherently a merchandise board and "may be used" for selling merchandise by lottery—even the so-called money boards may be used to distribute merchandise. Every witness, customers of petitioners, who testified in this case, except petitioners' expert and counsel, Mr. James, stated that petitioners' boards were used for the purpose of selling merchandise to the public by lottery and that they did not know of any other manner in which they were used (Supp. Tr. R. pp. 107–130). It is obvious, therefore, that petitioners' punchboards, though numerically keyed to an answer book or a checker problem, nevertheless represent another attempt of this industry to evade the impact of the decisions of the Courts of Appeals in lottery cases.

State courts have often commented upon the ingenuity with which those who seek to profit by developing the gambling instinct of the public attempt to elude the laws against gambling. Indeed, "No sooner is a lottery defined * * * than ingenuity is at work to evolve some scheme of evasion which is within

the mischief, but not quite within the letter, of the definition." *State* v. *Lipkin,* 169 N. C. 265, 84 S. E. 340, 343 (1915). The constant aim of those who live by promoting lottery schemes is "to streamline the plan with a view of concealing by name and technical operation and other fallacious pretenses one or more of the elements necessary to make it a lottery, gift enterprise, or game of chance." *State* v. *Omaha Motion Picture Exhibitors Assn.,* 139 Neb. 312, 297 N. W. 547, 550 (1941). "In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter, but to do violence to the spirit and thwart the beneficent objects and purposes of laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the Courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling. * * * [*State* v. *Joynt,* 341 Mo. 788, 110 S. W. 2d 737, 740 (1937), following *City of Moberly* v. *Deskin,* 169 Mo. App. 672, 155 S. W. 842, 844 (1943)]."

It has been recognized that Commission orders to cease and desist are "necessarily" general—*Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. 2d 673, 696 (C. A. 8, 1926)—because of the "impossibility of anticipating and mentioning every illegal variation" of proscribed conduct. *Oppenheim, Obendorf & Co.* v. *Federal Trade Commission,* 5 F. 2d 574, 575 (C. A. 4, 1925). And "possible un-

certainty of application in isolated instances" affords no basis for setting aside or modifying an order "otherwise valid and practical of operation," *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 772 (1931).

Further than this, the determination of the type of order necessary to protect the public from business practices similar to those of petitioners rests within the sound discretion of the Commission and the Courts will not disturb the Commission's orders unless they exceed the scope of the complaint or are on their face an abuse of discretion. The Supreme Court has frequently emphasized "the scope that must be allowed to the discretion and informed judgment of an expert administrative body." *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227–228 (1943). The Supreme Court has also declared that the Federal Trade Commission was created with the "avowed purpose of lodging the administrative functions committed to it" in the body of experts "especially competent to deal with them." *Federal Trade Commission* v. *R. F. Keppel & Bros., Inc.,* 291 U. S. 304, 314 (1934). It is "not in the province of the Court to absorb the administrative functions to such extent that the executive or legislative agencies become mere fact-finding bodies." *Gray* v. *Powell Co.,* 314 U. S. 402, 412 (1941).

Petitioners request this Court to modify the order here to the same extent and in like manner as the Court modified the orders in the *Lichtenstein* and *Bork* cases. In answering this request in the *Lichten-*

stein and *Bork* cases, we relied mainly on the fact that those cases could be easily distinguished from a former case before this Court in which the Commission's order was modified in the manner requested; namely, *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. 2d 261 (C. A. 9, 1942). The *Lee Boyer's* case was concerned with the shipment of candy packaged with lottery devices. The *Lichtenstein* and *Bork* cases involved only the shipment of the lottery devices, no merchandise being sold therewith. This Court modified the order in the *Lee Boyer's* case because the words "or may be used" might be construed to prevent the shipment of straight candy by petitioner, the reasoning being that the straight candy might be used in some lottery scheme. Although this Court, in modifying the orders in the *Lichtenstein* and *Bork* cases cited the *Lee Boyer's Candy* case in support thereof, the opinion of the Court in the *Lichtenstein* case indicated a different reason as a basis for the modification there made than that given in the *Lee Boyer's* case. This Court indicated that it based its action in the *Lichtenstein* case on the allegation in the complaint that the "only" use to be made of the punchboards involved was to enable the ultimate purchaser to sell merchandise and that the findings on this allegation distinguished those boards from so-called money boards used solely for gambling. In its opinion, the Court said "We are not here confronted with a case where the petitioners were called upon to meet a tendered issue of punchboard and push-card devices which 'may be used' in the sale of merchandise." It

therefore appears that the Court subjected the pleadings in that case and the findings of the Commission thereon to a strict and limited construction.

It is well settled that administrative agencies such as the Federal Trade Commission are not strictly bound by the technical rules of pleading and rigid rules of evidence. *Federal Trade Commission* v. *Cement Institute et al.,* 333 U. S. 683, 694 (1948). "Pleadings before the Commission are not required to meet the standards of pleadings in a Court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation which characterizes the proceedings of administrative bodies." *A. E. Staley Mfg. Co. et al.* v. *Federal Trade Commission,* 135 F. 2d 453 (1943).

It is also settled that variance between the order and the complaint of an administrative agency is not fatal unless such variance constitutes an entire abandonment of the very substance of the dispute and the substitution of another which the defendant could not anticipate and which they had no opportunity to meet. *Armand Co., Inc., et al.* v. *Federal Trade Commission,* 84 F. 2d 973 (C. A. 2, 1936).

The mere fact that the order is somewhat broader than the technical allegations in the complaint is of little consequence so long as the order does not encompass or include in its prohibition matters entirely foreign to the substance of the dispute to which petitioners were summoned and which petitioners, therefore, could not have anticipated and had no oppor-

tunity to meet. Surely a prohibition against the sale of punchboards that "may be used" cannot be characterized as including or substituting entirely different matter foreign to the disputed issue raised. That this proceeding cannot be so characterized is amply borne out by the fact that petitioners anticipated such an order and attempted to meet it by the testimony of their expert, Mr. James. Petitioners injected into this controversy the subject matter of boards that "may be used" as distinguished from boards that are actually used or only used for the sale of merchandise by lottery.

The Supreme Court has also said that, in determining the propriety of a Federal Trade Commission order, great weight is given to the Commission's conclusions as being the result of expertness coming from experience. In view of the Commission's familiarity with the problem here presented, and, further, in view of the continued subterfuges which have been resorted to, the Court should not lightly modify the Commission's order made in an effort to close the channels of interstate commerce to this gambling industry which makes use of it to violate the public policy of the Government against sale of merchandise by gambling. *Federal Trade Commission* v. *Cement Institute et al.,* 333 U. S. 683 (1948), rehearing denied (1948).

In proceedings of this nature, the power of the Court is not administrative but judicial. "The range of issues open to it is narrow. Only questions affecting constitutional power, statutory authority, and the

basic prerequisites of proof can be raised." If these legal tests are satisfied, the Commission's order becomes incontestable, and "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 139–140, 146 (1939); *Dobson* v. *Commissioner of Internal Revenue,* 320 U. S. 429, 501 (1943).

The "relation of remedy to policy," the Supreme Court has declared, "is peculiarly a matter for administrative competence" (*Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177), and the Courts will neither "substitute their own judgment" for that of an administrative agency, *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227 (1943), nor undertake to advise an agency "how to discharge its functions." *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 617–618 (1944).

In the circumstances we respectfully submit that based upon the testimony of Mr. James, together with the testimony of the witnesses who purchased petitioners' board, the Commission was fully warranted in entering an order broad enough not only to prohibit the sale of punchboards that are used and only used for the purpose of selling merchandise by lottery but also to include a prohibition against petitioners' boards which the evidence shows, due to their design, may be used for that purpose. The Commission is not required by law to limit its order to prohibit the

interstate distribution of punchboards that are used and only used for the sale of merchandise. To be of any value the order must also proscribe the distribution of boards which, due to their design, may be used for the purpose. For, as the Supreme Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, at pp. 435–436, it is

> a salutary principle that when one had been found to have committed acts in violation of the law he may be restrained from committing other related unlawful acts.

And at pp. 436–437, the Court said:

> Having found the acts which constitute the unfair labor practice, the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of the court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past.

The Commission's order here does no more than just that. It is broad enough to accomplish the purpose for which the proceedings against petitioners were instituted; namely, the prohibition against shipping lottery devices in interstate commerce that are to be used or which due to their design are suitable for use to sell merchandise in violation of the public policy of the United States Government against the sale of merchandise by lottery.

3. The proceeding is in the public interest

Petitioners' contention under this point is so obviously frivolous that we shall not dignify it with a reply except to state that petitioner in the *Lichtenstein* case made the same contention and this Court, speaking through Chief Judge Denman, in rejecting such contention said:

> Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention. The language of the Supreme Court in *Phalen* v. *Virginia,* 49 U. S. 163 (1850), as to the "pestilence" of lotteries which "enters every dwelling * * * reaches every class * * * and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.

IV

CONCLUSION

We therefore respectfully submit that there is no merit whatever to petitioners' contention here and that the order to cease and desist was properly entered. The Commission therefore prays that the petition to review be dismissed, that pursuant to the statute [10] the Court enter its decree affirming the Com-

[10] "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. § 45 (c).

mission's order and commanding petitioners to obey and comply therewith.

Respectfully submitted.

W. T. KELLEY,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
JNO. W. CARTER, JR.,
Attorney,
Attorneys for Federal Trade Commission.

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